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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, PETITIONER

v.

MAMPRIL SEQUEIRA PEDREIRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (R. 8–11) is reported at 213 F. 2d 768. The opinion of the District Court (R. 4–6) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1954 (R. 11–12). The petition for a writ of certiorari was filed September 28, 1954, and was granted November 15, 1954 (R. 12). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether deportation orders issued under the Immigration and Nationality Act of 1952 may be challenged in the courts otherwise than by habeas corpus proceedings.

2. If the answer to question (1) is in the affirmative, whether the Commissioner of Immigration and Naturalization is an indispensable party to the action.

STATUTES INVOLVED

The pertinent portions of the Immigration and Nationality Act of 1952 (66 Stat. 208, 8 U. S. C. 1252) and of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009), are set forth in the Appendix, infra, pp. 47–55.

STATEMENT

On March 15, 1954, respondent filed, in the District Court for the Southern District of New York, a petition seeking a judicial review of the proceedings which had resulted in the final deportation order against him (R. 1–3).[1] Specifically, the petition asked the court to review the order of the Board of Immigration Appeals, to declare the order of the hearing officer null and void, and to issue a temporary injunction restraining the execution of the deportation order

[1] Respondent's petition alleged that jurisdiction was based on the Immigration and Nationality Act of 1952, and on Section 10 of the Administrative Procedure Act (R. 1).

pending court review (*ibid.*). The petition named the District Director of Immigration and Naturalization for the District of New York as the sole adverse party (R. 1). It stated that on December 4, 1951, a hearing officer rendered a decision ordering respondent's deportation, to which respondent filed exceptions with the District Director; that on May 5, 1952, the Assistant Commissioner, Adjudications Division, adopted the hearing officer's decision; and that on June 24, 1953, the Board of Immigration Appeals ordered petitioner's appeal therefrom dismissed (R. 1–2). Respondent contended that his constitutional rights had been violated in that "the evidence adduced * * * was in contravention of * * * the Fifth Amendment in that your petitioner was deprived of due process of law" and "compelled to testify on matters which might tend to incriminate him such as his entry into the United States and his purposes in coming to the United States," and that there was "no legal evidence" to support the deportation order (R. 1, 2).

On March 25, 1954, the District Director moved, pursuant to Rule 12 (b), F. R. Civ. P., to dismiss the action on the grounds that the court lacked jurisdiction over the subject matter, that there was lacking an indispensable party to the action, *i. e.*, the Commissioner of Immigration and Naturalization, and that the petition failed to state

a claim upon which relief could be granted (R. 3). After a hearing, the District Court sustained the motion on the ground that either the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party to the suit, and, on that basis, found it unnecessary to reach the issue of whether the action was precluded by the Immigration and Nationality Act of 1952 (R. 4–7).

On appeal, the Court of Appeals for the Second Circuit reversed the order of the District Court and remanded the cause for further proceedings (R. 11–12), holding, on the authority of *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C.), affirmed by an evenly divided Court, 346 U. S. 929 (*Batista* v. *Nicolls*, 213 F. 2d 20 (C. A. 1), *contra*), that an action for declaratory relief under Section 10 of the Administrative Procedure Act is available to test the legality of the deportation order, and that nothing in the Immigration and Nationality Act of 1952 precludes such relief; and that neither the Attorney General nor the Commissioner of Immigration and Naturalization is an indispensable party to the action (R. 8–11).

SUMMARY OF ARGUMENT

I

Congress has reenacted in Section 242 (b) of the Immigration and Nationality Act of 1952 the provision that in deportation cases "the decision of the Attorney General shall be final." In *Heik-*

kila v. *Barber*, 345 U. S. 229, this Court held that identical language in the Immigration Act of 1917 precluded challenge of deportation orders in the courts except in habeas corpus proceedings, and made inapplicable the judicial review provisions of Section 10 of the Administrative Procedure Act which by its terms applies "Except so far as * * * statutes preclude judicial review."

In the *Heikkila* decision, it was pointed out that the term "final," as used in immigration legislation, has had a long history, "both in the statutes and in the decisions of this Court," precluding court intervention except in habeas corpus proceedings. The reenactment of this finality provision in the 1952 Act compels the conclusion that deportation orders continue to be reviewable by the courts only by way of habeas corpus.

Only the most conclusive evidence of a contrary Congressional purpose would warrant disregarding the long-established meaning of the express statutory language. No such intent is shown in the legislative history. That history shows that Congress was unwilling, at least in the absence of further study, to make a change in the existing law with respect to judicial review of deportation proceedings; particularly, it rejected amendments which would have extended the means of judicial review.

In the comprehensive 1950 report of the Senate Committee on the Judiciary (S. Rep. 1515, 81st

Cong., 2d Sess.), entitled *The Immigration and Naturalization Systems of the United States,* which embodies the Congressional understanding of existing law upon which the 1952 Act was predicated, it was stated that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." In making this statement, the report anticipated the decision of this Court in *Heikkila* v. *Barber, supra,* and it either rejected or ignored the prior decisions of the lower courts in *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457 (C. A. 3) and *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.), which held that Section 10 of the Administrative Procedure Act had made deportation orders reviewable in proceedings other than habeas corpus.

Again, in its subsequent S. Rep. 1137, 82nd Cong., accompanying the bill which became the Immigration and Nationality Act of 1952, the committee stated that the Act was not intended "to expand judicial review in immigration cases beyond that under existing law," indicating no change, after S. Rep. 1515, in its view of what the "existing law" was. This completely refutes the speculation of the Court of Appeals in *Rubinstein* v. *Brownell,* 206 F. 2d 449, 454, fn. 16 (C. A. D. C.), upon which the court below relied, that S. Rep. 1137, in speaking of "existing law," was referring to the decisions of the Courts of

Appeals which favored direct judicial review of deportation orders.

During the House debate, Representative Meader introduced an amendment to delete the provision of Section 242 (a) that the Attorney General's decision shall be "final" and to provide instead that "the order of deportation shall be subject to review by any court of competent jurisdiction." This was defeated. During the Senate debates, the general understanding was that the Act did not provide for review beyond habeas corpus. Senators Lehman, Moody, and Morse offered amendments which would have accomplished the result achieved below. Each of these amendments was rejected. While the debate on these amendments, particularly Congressman Walter's discussion in the House, tended to be confusing because it dealt in part with matters in addition to judicial review, it seems clear that the House and Senate were both unwilling to make changes in the review of deportation orders without further study.

The Court of Appeals in the *Rubinstein* case, *supra*, found in incidental references to "judicial review" in Section 242 (c) and (e), dealing with the time period for the execution of deportation orders, support for its conclusion that the Act provided for direct judicial review. The court believed these references indicated that Congress intended to provide for "judicial review" as such, rather than merely to refer to the historic method

of testing deportation procedures through habeas corpus. But, it is much more probable that Congress was simply recognizing that the actual deportation of an alien is usually deferred during judicial examination of the deportation order in habeas corpus proceedings. The Court of Appeals in the *Rubinstein* case also thought that Section 360 (c) of the Act expressly limited review of exclusion orders to habeas corpus, from which it concluded that Congress did not intend so to limit the review of deportation orders. This deduction is erroneous in that Section 360 (c) does not deal with exclusion of aliens generally, but provided a new and restrictive method by which persons without the United States could assert claims of American citizenship. Exclusion orders generally are governed by Section 236 (c) which, like the former exclusion statute which was before this Court in *Tom We Shung* v. *Brownell*, 346 U. S. 906, provides that the administrative decision in exclusion cases shall be "final."

Taking the legislative history of the Act as a whole, it is highly unlikely that Congress would have legislated by implication to make a novel departure from the historical method of review of deportation orders by habeas corpus. If it had, it surely would have made some provision for the procedural problems created by such departure, such as venue, expedition in determination of petitions for review, and the prevention of abuses by repetitious judicial proceedings.

II

Assuming, *arguendo*, that a final deportation order may be reviewed apart from habeas corpus proceedings, such review can be had only in an action brought against the Commissioner of Immigration and Naturalization in the District of Columbia. The relief sought by respondent is a review on the merits of a deportation order which runs to any director in whose district respondent may be found. The attack goes to its validity, not only as specific authority for the anticipated action of petitioner, but also as general authority for the possible action by any other district director. Since a disposition of the action would inevitably affect his public duties, the Commissioner has a predominant interest in the subject matter of the action. Therefore, in accordance with traditional principles of practice, he should be considered an indispensable party to such action so as to insure him an opportunity to defend that interest. Cf. *Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152; *Plested* v. *Abbey*, 228 U. S. 42, 50–51; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199; *Brown* v. *Christman*, 126 F. 2d 625 (C. A. D. C.); Rule 19 (a), F. R. Civ. Proc. Moreover, since a decree in the instant case would not preclude directors in other districts from deporting respondent, if he should be found in any of their districts, it would not expend "itself on the subordinate official who is

before the court", and, therefore, it could not "effectively grant the relief desired." *Williams* v. *Fanning*, 332 U. S. 490, 492. This is the holding of the courts of appeals in the Third and Ninth Circuits. *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C. A. 3); *Rodriguez* v. *Landon*, 212 F. 2d 508 (C. A. 9).

ARGUMENT

I. Deportation orders are subject to review by the courts only in habeas corpus proceedings

A. Under the rationale of *Heikkila* v. *Barber*, 345 U. S. 229, the provision of Section 242 (b) of the Immigration and Nationality Act of 1952 that in deportation cases the decision of the Attorney General shall be "final" deprived the District Court of jurisdiction to review the order for respondent's deportation in an action under the Administrative Procedure Act

This case presents the issue, unresolved because of the equal division of this Court in *Rubinstein* v. *Brownell*, 346 U. S. 929, as to whether Section 242 (b) of the Immigration and Nationality Act of 1952, forbids the review of deportation orders by proceedings other than habeas corpus. Section 242 (b) provides that, "In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final." Under the rationale of this Court's decision with respect to an earlier version of the law in *Heikkila* v. *Barber*, 345 U. S. 229, the command of the 1952 Act that in deportation cases the Attorney General's decision shall be "final" must mean that deportation orders may

be challenged in the courts only in habeas corpus proceedings. This view is supported by the direct holding of the Court of Appeals for the First Circuit in *Batista* v. *Nicolls*, 213 F. 2d 20.

In *Heikkila* v. *Barber, supra,* an alien who had been ordered deported under the Immigration Act of 1917 sought judicial review of the deportation order in an action for review under Section 10 of the Administrative Procedure Act. Looking to the provision of Section 19 (a) of the 1917 Act that "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final," this Court concluded that Congress had denied judicial intervention in deportation cases except to the extent provided by habeas corpus proceedings made available by the Constitution. Accordingly, it was held that deportation orders fell within the introductory provision of Section 10 of the Administrative Procedure Act excepting administrative decisions from judicial review "so far as (1) statutes preclude" such review, with the result that such orders continued to be challengeable in the courts only in habeas corpus proceedings, notwithstanding the Administrative Procedure Act.

Reviewing the history of the statutory provisions that in deportation cases the decision of the Attorney General shall be "final," this Court noted (345 U. S. at 233–235):

That the Attorney General's decisions are "final" does not settle the question. The appellant properly emphasizes the ambiguity in that term. Read alone, it might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked. But "final," as used in immigration legislation, has a history, both in the statutes and in the decisions of this Court. It begins with § 8 of the Immigration Act of 1891, 26 Stat. 1085, which provided in part that "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." * * * With changes unimportant here, this finality provision was carried forward in later immigration legislation. See, e. g., § 25 of the 1903 Act, 32 Stat. 1220, and § 25 of the 1907 Act, 34 Stat. 906. During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution. * * *

Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 889, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. And the de-

> cisions have continued to regard this point as settled. *Kessler* v. *Strecker*, 307 U. S. 22, 34 (1939); *Bridges* v. *Wixon*, 326 U. S. 135, 149, 166, 167 (1945); *Estep* v. *United States*, 327 U. S. 114, 122, 123, n. 14 (1946); *Sunal* v. *Large*, 332 U. S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. * * *

New legislation is to be construed in the setting of existing law and practice. See *Stark* v. *Wickard*, 321 U. S. 288, 309; *Burnet* v. *Harmel*, 287 U. S. 103, 108; *United States* v. *Sanges*, 144 U. S. 310, 311. The reenactment, practically verbatim, in Section 242 (b) of the 1952 Act of the "final" clause of the 1917 Act which was before this Court in *Heikkila* compels the conclusion that under the new Act deportation orders continue to be challengeable in the courts only in habeas corpus, and may not be reviewed in actions under the Administrative Procedure Act. See *Batista* v. *Nicolls*, 213 F. 2d 20, 22 (C. A. 1).[2] This conclusion does not rest solely upon the reenactment of the finality clause. As is pointed out *infra*,

[2] The District Courts generally have considered the rationale of *Heikkila* v. *Barber*, *supra*, applicable under the 1952 Act. *Ng Gwong Dung* v. *Brownell*, 112 F. Supp. 673 (S. D. N. Y.); *Mirabel* v. *Glover* (D. P. R., Civ. No. 8445), June 18, 1953; *Sursos* v. *Zimmerman* (E. D. Pa., Civ. No. 14913), March 31, 1953; *Hyun* v. *Landon* (S. D. Cal., No. 15693–T), July 17, 1953; *Fougerouse* v. *Brownell* (D. Ore., Civ. No. 7328), January 18, 1954.

Congress voted down proposals to make specific provision for court review. Moreover, in modern times, Congress ordinarily makes detailed arrangements (in such respects as timing and venue) for direct judicial review where such review is contemplated. See Davis, *Administrative Law* (1951), pp. 724–729. The failure of Congress to make such provision in the comprehensive revision of the immigration laws in 1952 is strong confirmation that it did not contemplate judicial intervention in deportation cases except in habeas corpus proceedings in accordance with well-established rules. Cf. *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, 562 (C. A. 9).

B. The legislative history of the 1952 Act confirms that Congress was unwilling to make deportation orders reviewable by the courts in proceedings other than habeas corpus

The accepted meaning of the term "final" with respect to deportation orders could be overcome only by clear evidence of congressional intent to modify it. There is no expression of such purpose in the language of the statute. The phraseology and structure of the reviewability provisions are so clear that resort to legislative history ought to be unnecessary. However, since the court below relied upon the reasoning in *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C.), where the Court of Appeals for the District of Columbia Circuit rested in large part upon statements made in the course of the long Congressional debates,

an analysis of the legislative history of the 1952 Act is necessary. That legislative history shows that Congress was unwilling, at least in the absence of further study, to make a change in the existing law with respect to judicial review of deportation proceedings; in particular, it rejected amendments which would have extended the right of judicial review.

1. *The Senate Reports.* The Immigration and Nationality Act of 1952 was preceded by extensive Congressional studies of the pre-existing laws and their operation. The results of these studies are contained in S. Rep. 1515, 81st Cong., 2d Sess., dated April 20, 1950, a report of the Senate Committee on the Judiciary entitled *The Immigration and Naturalization Systems of the United States,* made pursuant to a Senate "Resolution To Make An Investigation of the Immigration System" (S. Res. 137, 80th Cong., 1st Sess.). This report expresses the Congressional understanding of the prior law upon which the 1952 Act was predicated. It contains the following statement (p. 629):

> *Judicial review*
>
> Once the order and warrant of deportation are issued, the administrative process is complete. Under the fifth amendment to the Constitution, the "due process" provision, the alien may, however, petition for a writ of habeas corpus. In a habeas corpus proceeding, based on a deportation case, the court determines whether or not

> there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. *Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.* The dismissal of an application for a writ of habeas corpus is not a bar to the filing of another application before another judge. [Emphasis added.]

It is significant that the quoted statement, made in 1950, anticipates this Court's decision in *Heikkila v. Barber, supra,* and that it either rejects or ignores the prior decisions of the Courts of Appeals for the Third and District of Columbia Circuits, rendered in 1948 and 1949 respectively, holding that Section 10 of the Administrative Procedure Act had made deportation orders reviewable in proceedings other than habeas corpus. *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457 (C. A. 3); *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.), affirmed on other grounds, 340 U. S. 162.

On the same day that S. Rep. 1515 was issued, Senator McCarran introduced S. 3455 (81st Cong., 2d Sess.), the precursor of the 1952 Act. Section 106 of S. 3455 provided that determinations of fact and exercises of discretion by administrative officers "shall not be subject to review by any court," and that determinations of law by admin-

istrative officers "shall not be subject to review by any court except through the writ of habeas corpus." This Section 106 also appeared in the successor bills, S. 716 and H. R. 2379, which were introduced in the First Session of the 82d Congress. These provisions would have restricted drastically the area of judicial intervention in deportation cases. Cf. *Bridges* v. *Wixon*, 326 U. S. 135, and *Carlson* v. *Landon*, 342 U. S. 524.

During the joint hearings before the Subcommittees on the Judiciary on S. 716 and H. R. 2379, in March and April 1951, this novel and restrictive effect of Section 106 was called to the attention of the subcommittees, particularly by the representatives of the American Civil Liberties Union and the American Bar Association, who pointed out that it would cut off the review of findings of fact which otherwise would be available in habeas corpus for both exclusion and deportation cases. Hearings, pp. 136–138, 526–530.

Apparently as a result of such objections, when the successor bills, S. 2550 and H. R. 5678, were introduced in the Second Session of the 82d Congress, Section 106 was omitted. The only explanation of the omission is contained in the report of the Senate Committee on the Judiciary (S. Rep. 1137, 82d Cong., 2d Sess.), accompanying S. 2550, which states (p. 28) that:

> In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the

> exercise of administrative discretion should not be subject to judicial review and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. *The omission of the language is not intended* to grant any review of determinations made by consular officers, nor *to expand judicial review in immigration cases beyond that under existing law.* [Emphasis added.]

The quoted language, read in the light of the objections raised at the hearings, makes it clear that the deletion of Section 106 represented abandonment of the idea of *restricting* the area of review which had theretofore prevailed in habeas corpus proceedings in deportation cases, so as to leave the review of deportation cases in the same position as prevailed *"under existing law."* It is likewise clear that the Committee, in using the phrase "existing law" in S. Rep. 1137, was necessarily referring to the law as understood and expressed in its prior report (S. Rep. 1515, 81st Cong.)—that the scope of judicial review in deportation cases was limited to a habeas corpus remedy for an alien in custody. This is particularly true, because S. Rep. 1137, in interpreting the provision of S. 2550 relating to deportation proceedings, which was to be declaratory of the existing laws, states (p. 30):

> The bill declares that the prescribed deportation proceedings shall be the sole and

> exclusive procedure for determining the deportability of any alien, notwithstanding the provisions of any other law. In any case in which an order of deportation is entered under the provisions of the bill, or any other law or treaty, the decision of the Attorney General is final.[3]

Clearly, this statement of the Committee is not a summary of the rulings in *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457 (C. A. 3), or *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.), where it had been held that deportation orders were subject to review under the Declaratory Judgment and Administrative Procedure Acts. On the contrary, it is essentially a paraphrase of the Committee's 1950 statement (S. Rep. 1515) of the law on this subject. It, therefore, completely refutes the speculation of the Court of Appeals in *Rubinstein* v. *Brownell,* 206 F. 2d 449, 454, fn. 16 (C. A. D. C.), that the phrase "existing law" as used in S. Rep. 1137, which was issued on January 29, 1952, "at that date included the Administrative Procedure Act as it had been interpreted in 1948, 1949, and 1950 by the *Trinler, Kristensen* and *Prince*[4] decisions."

Thus, as S. 2550 and H. R. 5678 came to the floors of the Senate and the House, both provided

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[3] H. Rep. 1365, 82d Cong., 2d Sess., pp. 27, 58, which was predicated upon basic findings made in S. Rep. 1515, contained the same statement.

[4] *Prince* v. *Commissioner,* 185 F. 2d 578 (C. A. 6).

in Section 242 (b) that in deportation cases the Attorney General's decision should be final and the history of the bills and the committee reports show that this finality excluded all judicial review except the constitutionally required safeguard of habeas corpus.

2. *The House debate.* The first debate took place in the House on H. R. 5678. There, Representative Meader introduced an amendment which would have deleted the provision of Section 242 (b) that the Attorney General's decision in deportation cases shall be "final" and would have provided instead that "the order of deportation shall be subject to review by any court of competent jurisdiction." (98 Cong. Rec. 4415, 4414.)[5] After a remark by Representative Walter (*id.* 4414), who was in charge of the bill, that the bill reinstated the decision of *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (which actually dealt with hearing procedures), Congressman Meader, arguing in support of the amendment, said (*id.* 4415):

[5] Two other amendments, proposed by Representative Meader, would have eliminated the provision of Sections 242 (a) and (c) which require a "conclusive showing" of delay by the Attorney General as a basis for relief in a habeas corpus proceeding to test detention of an alien pending completion of deportation proceedings or the execution of a deportation order. Representative Meader's amendments would have given the courts general jurisdiction to review the action of the Attorney General in detaining an alien without specifying that the proceeding be in the nature of habeas corpus or the grounds necessary for relief.

"I say we ought to say plainly and unequivocally that administrative decisions are subject to judicial review. This amendment will make clear that judicial review is available. We should not leave it up to a tenuous interpretation of some Supreme Court decision." He also stated: "the most serious part, it seems to me, is the provision that the Attorney General's decision shall be final. I think it is about time we restored the right of individuals to have their cases heard in a court. * * * If that language does not deny access to the courts, then it seems to me it does not belong in this act" (*id.* 4415). Representative Walter, in opposing the amendment, replied (*id.* 4415–4416):

> * * * The gentleman seems to be concerned lest the right to a writ of habeas corpus be affected. I refer the gentleman to the Constitution of the United States, and I am sure if he looks at it again he will find that he need have no fear on that score, because a writ cannot be denied.
>
> Now, we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedures Act is applicable. From that decision an appeal lies in the courts. If there is not a final administrative decision, then these aliens will go

> from one administrative body to another, seeking relief, because they do not want a final adjudication.
>
> * * * In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.
>
> I would like to remind the gentleman of one thing, that Senator McCarran, who sat in these hearings, and in the preparation of this bill, and I, were both commended by the American Bar Association because of the work we did in providing for judicial review from a decision of an administrative agency. We have been very zealous to see that the philosophy underlying that act is embodied in this measure. I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted.

The Meader amendment was defeated (*id.* 4416, 4415).

Representative Walter's statement, which is the only outright assertion in the Congressional debates that Section 10 of the Administrative Procedure Act applies in deportation cases, was

heavily relied upon by the Court of Appeals in *Rubinstein* v. *Brownell*, 206 F. 2d 449, (454–455) (C. A. D. C.). However, this unprepared statement, made in course of debate, can hardly have such controlling weight when considered in relation to the whole legislative history of the Act. The actual question before the House, at the time the statement was made, related to the fears of Representative Meader that the scope of review in habeas corpus was being curtailed. Representative Walter was assuring the House that the Constitution guaranteed minimum judicial review in habeas corpus. He went further and said that there was additional review, but then he also talked about the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, which related, not to judicial review, but to the conduct of administrative hearings. The whole tone of the statement was to assure the House that in the new Act there was ample protection from arbitrary and capricious administrative action. But not all the statements made in the course of this one, unprepared speech are entirely accurate and they cannot be relied upon as an authoritative interpretation of the statute.

3. *The Senate debate.* In the course of the Senate debates on S. 2550, it was generally understood that the bill did not provide for judicial review of deportation orders beyond habeas corpus proceedings (see, for example, 98 Cong. Rec. 5113, 5154–5155, 5165, 5180, 5212, 5213, 5315, 5316,

5418, 5420–5421, 5434, 5604, 5778, 5781). In the Senate, as in the House, discussion of the judicial review of deportation orders centered around proposed amendments which would have accomplished the result of the decision below. The Senate rejected three amendments which were probably intended to make review under the Administrative Procedure Act, in addition to habeas corpus, available for judicial scrutiny of exclusion and deportation orders. The first amendment, which was in the nature of a substitute offered by Senator Lehman for himself and others, provided, *inter alia,* for the establishment of the Board of Immigration Appeals as an independent agency within the Department of Justice. Section 8 of the Lehman substitute provided that, "The provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens" (98 Cong. Rec. 5427–5428).

Senator Moody proposed a new Section 105 (a), under which the Board of Immigration Appeals would have been vested with authority to review "any decision of the Attorney General * * * in proceedings relating to exclusion [or] deportation * * *." The Moody amendment concluded with the sentence "Except in the case of proceedings under section 235 (c) [relating to security cases], the provisions of the Administrative Procedure Act shall apply to all proceedings of the Board" (98 Cong. Rec. 5778).

Senator Morse offered an amendment to Section 242 (b) designed (1) to make the hearing provisions of the Administrative Procedure Act applicable to deportation and exclusion proceedings, and (2) to provide specifically that "Notwithstanding any provisions to the contrary, * * * every person aggrieved by an adverse order in exclusion or deportation proceedings may obtain court review in an action for declaratory judgment pursuant to title 28, United States Code, section 2201, or upon a writ of habeas corpus" (98 Cong. Rec. 5781).

Senator McCarran opposed the Morse amendment, particularly on the ground that it would grant a right of judicial review with respect to *exclusion* orders, a right which, he asserted, had never previously been recognized under international law (98 Cong. Rec. 5789). He opposed the Moody amendment on the grounds (1), that it would create an administrative body, within the Justice Department, which could set aside decisions of the Attorney General, the highest officer of the Department, and (2) that it would be unwise t establish the Board of Immigration Appeals as a statutory body, in view of the provisions of S. 14, previously introduced by the Senator, to create an administrative court to review all administrative determinations (98 Cong. Rec. 5778). In connection with the Moody amendment, Senator McCarran stated (98 Cong. Rec. 5778): "The Administrative Procedure Act is

made applicable to the bill. The Administrative Procedure Act prevails now. The Senator need not worry about its not being in the law, because the Administrative Procedure Act covers the very point which the Senator is attempting to reach." Senator McCarran's statement, read in context, probably related to the *administrative procedures* provisions of the Moody amendment.[6] Senator McCarran similarly objected to the "sweeping provision [in the Lehman substitute] that the provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens." Among other reasons, he opposed the Lehman substitute because of the pendency of S. 14, stating in this connection that "the question of the review of decisions of the Immigration and Naturalization Service had better not be the subject of impulsive tampering at this time" (98 Cong. Rec. 5625). The Lehman, Moody, and Morse amendments were defeated (98 Cong. Rec. 5630).

It is clear that Senator McCarran was unwilling to permit review other than in habeas corpus proceedings with respect to exclusion orders, and he and Senator Ferguson, another member of the committee from which the bill was reported, also

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[6] In fact, on the next page of the Congresional Record (98 Cong. Rec. 5779) Senator McCarran stated: "* * * The bill provides for administrative procedures and makes the Administrative Procedure Act applicable *insofar as the administration of the bill is concerned.* [Emphasis added.]"

indicated that habeas corpus was the proper remedy for the review of both exclusion *and deportation* orders, in the following colloquy (98 Cong. Rec. 5779):

> Mr. FERGUSON. I wish to inquire whether it would be possible to obtain an appeal[7] through a writ of habeas corpus, in connection with which the application of the rule of substantial evidence would be determined.
>
> Mr. MCCARRAN. That is correct, and it is done right along.

4. *The Conference Reports.* The general terms of the Conference Report, H. Rep. 2096, 82d Cong., 2d Sess., throw no light on the subject of judicial review. The report briefly states at p. 127:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.

This statement must be read against the background, noted *supra*, pp. 16–19, that the several

[7] The use of the term "appeal" in this context is another indication of the loose employment in the Congressional debates of terminology with respect to judicial review.

ancestor bills, introduced as late as the first session of the same Congress, all contained a provision which would have drastically curtailed the scope of habeas corpus review. The first sentence recites only that consideration has been given to problems of judicial review under the bill—problems of whether and what review should be provided for consular decisions on visa applications and for claims of citizenship—as well as for exclusion and deportation decisions. The second sentence can mean no more than that the special administrative procedures provided in Sections 236 and 242 for exclusion and deportation cases were designed to afford aliens the protection of precisely defined procedures and procedural rights. Certainly, the phrase "judicial procedure" in the second sentence could not refer to direct judicial review, because it also had reference to exclusion proceedings, which all agreed were not intended to be subject to review, save in habeas corpus.[8]

[8] That such general terms throw no light on specific problems of judicial review is also demonstrated in the report of the House Committee on the Judiciary (H. Rep. 1365, 82d Cong., 2d Sess., p. 28), which simply states that the bill "Safeguards judicial review and provides for fair administrative practice and procedure (secs. 235, 242, and 360)." Again, the reference to the safeguarding of judicial review must be considered against the background of the earlier bills limiting extremely the scope of habeas corpus in deportation matters. The provisions in the enumerated sections for judicial action relate to judicial enforcement of administrative subpoenas (Section 235), a limited review of detention decisions in habeas corpus proceedings (Section 242), and judicial determination of certain claims of American citizen-

C. A reading of the Act as a whole does not support the conclusion that Congress intended to provide additional forms of court review

The Court of Appeals in *Rubinstein* v. *Brownell*, 206 F. 2d 449, 452–453 (C. A. D. C.), placed great reliance upon the provision of Section 242 (c) that "the Attorney General shall have a period of six months from the date of such [deportation] order, *or, if judicial review is had, then from the date of the final order of the court,* within which to effect the alien's departure from the United States * * *."[9] [Emphasis added by the court.] Referring to this Court's distinction in *Heikkila* v. *Barber*, 345 U. S. 229, 236, between habeas corpus and "judicial review as that term is used in the Administrative Procedure Act," the Court of Appeals in the *Rubinstein* case stated that " 'Judicial review' is not synonymous with habeas corpus," and concluded that by the reference to "judicial review" in Section 242 (c) Congress intended to make deportation orders reviewable otherwise than in habeas corpus (206 F. 2d at 452). To the contrary, we believe that it is clear on the face of Section 242 (c) that the incidental reference to "judicial review" merely

ship (Section 360). Thus, it is clear that general references to judicial review under the Act may relate to any one of several different matters, and, absent a specific context, are of no assistance in the interpretation of a particular provision of the Act.

[9] A similar reference to "judicial review" appears in Section 242 (e).

reflects the understanding of Congress that the actual deportation of an alien is frequently deferred pending judicial review of deportation orders *in habeas corpus proceedings,* and was made solely for the purpose of insuring that the authorized detention period shall not end until six months after the Attorney General becomes free to effect the alien's removal.

There is no basis for the assumption in the *Rubinstein* decision that in thus alluding to "judicial review" Congress was drawing a precise technical distinction between the scrutiny permissible in habeas corpus and direct "judicial review." The phrases, "judicial review" and "habeas corpus," although technically not synonymous in that the latter does not embrace the full scope of review connoted by the former, are not incongruous and ordinarily they may be used interchangeably. The phrase "judicial review" in subdivisions (c) and (e) of Section 242 of the Act was not used independently to define or describe the scope of the review mentioned therein, but rather it was used relatively, that is to refer to a procedure which would affect the time schedule for execution of deportation. Thus, it was not necessarily used in the technical sense of direct judicial review, in which sense, as this Court observed in the *Heikkila* case, *supra,* at 236, it is differentiated from habeas corpus review.

Nor is there any basis for the supporting assumption in the *Rubinstein* case, *supra,* at 453,

that Congress was aware of, accepted, and wrote into the Act the result of the *Trinler* (166 F. 2d 457), *Prince* (185 F. 2d 578) and *Kristensen* (179 F. 2d 796) decisions of the Third, Sixth and District of Columbia Circuits holding that review under the Administrative Procedure Act was available. That this assumption, as well as its presumption that Congress intended to employ the phrase "judicial review" in Section 242 in its technical sense of direct review, is unwarranted, is evidenced as we have shown above by the expressed basic views of the Senate Judiciary Committee (*supra*, pp. 15–16), in S. Rep. 1515, *The Immigration and Naturalization Systems of the United States* (p. 629) that:

> * * * In a habeas corpus proceeding, based on a deportation case, the court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. *Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.* * * * [Emphasis added.]

In view of this precise understanding of the Senate Committee that habeas corpus was the sole method by which deportation orders can be challenged in the courts, plus the express refusal of Congress to provide additional methods of review, it cannot be contended that the incidental

allusions to "judicial review" in Section 242 (c) and (e) refer to anything other than review in habeas corpus proceedings.

The quoted language of the basic report, S. Rep. 1515, likewise reveals, contrary to the assumption of the Court of Appeals in the *Rubinstein* case (206 F. 2d at 452), that Congress in enacting the provision of Section 242 (b) (4), requiring the Attorney General to issue administrative regulations prescribing that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence,"[10] did not contemplate any changes in the type or in the timing of review of deportation orders. In addition, the fact that Congress directed the Attorney General to prescribe the standard for decision in his regulations clearly indicates a direction to him as to how the Act should be administered, rather than the establishment of a new rule for court review.

The only fair conclusion that can be drawn from Section 242 as a whole is that the sole method of review contemplated by that section is in habeas

[10] Concerning this requirement the House Committee stated that it "means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below," H. Rep. No. 1365, 82d Cong., 2d Sess., p. 57. However, the words "appellate body" do not necessarily refer to direct review; they are equally apt with reference to administrative review or habeas corpus.

corpus proceedings. In subdivision (a) provision is made for detention or release of the alien "pending a determination of deportability." Subdivision (b) provides for the administrative procedure to be followed in determining deportability. And then subdivision (c) provides that:

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond [etc.].

The Court of Appeals, in the *Rubinstein* case, while recognizing that in Section 242 (a) and (c) Congress intended to provide authority for the continuous detention of an alien from the commencement of deportation proceedings and until the close of the six-month period which the Attorney General has to effect deportation, saw a possible gap in this authority. It found this gap in the period in which an alien is challenging the order for his deportation in the courts, on the theory that "if judicial review is had" paragraph (c) authorizes detention of the alien only during the period of six months following the completion of the judicial proceedings. The court closed this asserted gap by reading the detention provision of paragraph (a), not-

withstanding its express limitation to "pending a determination of deportability", as applying during the period of "judicial review" (206 F. 2d at 455). However, it should be noted that there is no "gap" if the reference to "judicial review" in paragraph (c) is read to mean review in habeas corpus. Since the alien may commence habeas corpus proceedings only after he has been taken into custody under a final order of deportation, there was no need to provide in Section 242 (c) an express grant of authority to take the alien into custody during the pendency of the judicial proceedings. The mere fact that such an apparent break in the authority to detain is created by the decision below strongly suggests that the Act contemplates that deportation orders will be challenged only in habeas corpus proceedings, in which event no such gap exists.

Finally, the court in *Rubinstein* sought textual support for its conclusions in the provision of Section 360 (c) of the 1952 Act (8 U. S. C. 1503) that "A final determination by the Attorney General that any *such* person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise." [Emphasis added.] The Court of Appeals concluded from this language that Congress had expressly limited persons seeking admission to the United States to review in habeas corpus, and that its failure to impose

such a restriction in deportation cases reflected a purpose to make deportation orders reviewable in proceedings other than habeas corpus (206 F. 2d at 453). But, the provision cited had an entirely different purpose and history. In enacting Section 360, Congress was creating a change in the existing law. Under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, persons claiming to be citizens or nationals of the United States, regardless of whether such persons were within or outside the United States, were given a special declaratory judgment procedure to obtain a judicial determination of their claims. The purpose of Section 360 of the 1952 Act is to make that prior judicial procedure unavailable to persons outside the United States and to provide for the determination of the claims of persons asserting citizenship by the Attorney General in administrative exclusion proceedings.[11] In providing that such determinations of the Attorney General "shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise," Section 360 (c) is obviously intended to emphasize and make clear the withdrawal of the right to an independent judicial determination. It has nothing to do with ordinary exclusion cases as to which Section 236 (c) (8 U. S. C. 1226 (c)) merely provides, like the

[11] The remedy is restricted to persons who have previously been in the United States or persons under 16 born abroad of parents who were citizens. It has no application whatever to persons admittedly alien seeking admission.

former exclusion statute which was before this Court in *Tom We Shung* v. *Brownell*, 346 U. S. 906, that the administrative decision shall be "final." In brief, the Court of Appeals drew an entirely erroneous conclusion from Section 360 (c).

The legislative history of the statute, as discussed above, pp. 14–28, contains positive indication of Congressional purpose to retain unreviewability, save for the constitutional minimum. The unsuccessful efforts of opponents of the bill, in both the House and the Senate, to amend the bill so as to provide for unlimited review of deportation orders is rather clear proof that the bill as enacted was not intended to provide for unlimited review. However, even if there were no affirmative indication of Congressional intent against unlimited reviewability, the inherently political nature of the subject matter of deportation is a special reason for exercising caution on questions of unlimited reviewability. Generally, in interpreting statutes, what is implicit therein is as much a part of the statute as what is explicit. Cf. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297.

D. Congress would not have expanded an historically established form of review of deportation orders without making some arrangement for procedural requirements incidental to such expansion

If Congress had intended to make a novel departure from the historical method of review of deportation orders, Section 242 (b) of the Immigration and Nationality Act of 1952 is strangely

silent concerning the procedural problems inevitably created by such departure. If the Act, as the court below held, permits declaratory and injunctive relief under Section 10 of the Administrative Procedure Act, then it makes no provision for such important aspects as venue, expedition in determination of petitions for review, and the prevention of repetitious judicial proceedings. Specifically, there is no provision authorizing the filing of a petition for judicial review of a final deportation order under Section 10 of the Administrative Procedure Act in the federal district court within which the administrative deportation proceedings were conducted. As we contend in Point II, *infra*, the Commissioner of Immigration and Naturalization would be an indispensable party to any action to review deportation orders under Section 10. Thus, the venue in such actions would in the absence of legislation necessarily lie in the district of his official residence, Washington, D. C. Besides the hardship and inconvenience that such venue would occasion for the alien, it will have the undesirable result of centralizing that type of litigation in the already overworked courts of the District of Columbia. In sharp contrast, the historical practice of restricting review of deportation orders to habeas corpus proceedings has the advantage of invoking well-established rules as to the venue of such proceedings and as to the official who should be named as respondent. Habeas corpus must be brought in the judicial district in which

the alien is held in actual or nominal custody, *Ahrens* v. *Clark*, 335 U. S. 188, and it must be directed to the officer who detains him. 28 U. S. C. 2243.

Furthermore, since there is no provision for the expeditious determination of petitions for judicial review in the same manner as in habeas corpus proceedings, the congested court calendars would necessarily retard review. It is significant that out of 44 complaints seeking review of deportation orders filed in the District Court for the District of Columbia alone, between the time of the decision of this Court in the *Rubinstein* case on January 11, 1954, and November 26, 1954, only four have been reduced to judgment.

Finally, the subjection of deportation orders to direct judicial review will in the absence of statutory protection result in a multiplicity of judicial proceedings with respect to a single issue. An alien might, after an adverse ruling on his petition for review of his deportation order, still obtain further delay through a series of habeas corpus proceedings.

The foregoing procedural problems, which must be solved by the courts if it is judicially determined that deportation orders are subject to direct review under Section 10 of the Administrative Procedure Act, are matters more appropriately provided for by legislation. It should be left to the legislature, not only to provide for the type and the scope of judicial review of deportation orders as soon as

they are administratively final, but at the same time to prescribe orderly venue arrangement, and to provide means for minimizing the possible abuses of repetitious reviews. As Justice Frankfurter stated in his dissenting opinion in *Stark* v. *Wickard*, 321 U. S. 288, 312: "Apart from the text and texture of a particular law in relation to which judicial review is sought, 'judicial review' is a mischievous abstraction. There is no such thing as a common law of judicial review in the federal courts." [12]

Recognizing the deficiency of the habeas corpus remedy from the standpoint of the alien, the Attorney General, on March 10, 1954, in identical letters to the Speaker of the House of Representatives and the Vice-President urged the enactment of legislation to permit direct judicial review of deportation orders. (Press Release, Department of Justice, dated March 10, 1954.) Together with the letters, he submitted a draft of a proposed bill [13] designed to settle the problems discussed above. Until Congress acts, no matter how desirable as a matter of policy and principle a change in the historical review of deportation orders is, such a change should not be effected by the judiciary.

In the final analysis, if it is determined that aliens should continue to be limited to a review of deportation orders in habeas corpus proceedings, they will continue to enjoy substantial rights

[12] Compare Justice Frankfurter's proposal in his dissenting opinion in *Heikkila* v. *Barber*, 345 U. S. 229, 240–241.

[13] A copy of the pertinent portions of the letter and of the proposed bill appears in Appendix B, *infra*, pp. 56–60.

of review. As the Attorney General, in referring to *Heikkila* v. *Barber*, 345 U. S. 229, has recently stated: "Regarding the scope of review, it is doubtful whether the scope is now any different in habeas corpus from that which is accorded to the orders of other agencies under section 10 of the Administrative Procedure Act." *Report of the Judicial Conference of the United States* (September, 1953) p. 43.

II. The Commissioner of Immigration is an indispensable party to an action for declaratory relief

If this Court holds, as we urge, that deportation orders may be challenged only in habeas corpus proceedings, the venue of such proceedings will be governed by the habeas corpus statute (28 U. S. C. 2241, *et seq.*). However, if it is held that deportation orders may be reviewed in an action for an injunction or a declaratory judgment under Section 10 of the Administrative Procedure Act, there arises the question whether such actions may be brought against the District Director of the Immigration and Naturalization Service in the judicial district in which he is stationed, or whether they must be brought against his superior officer, the Commissioner of Immigration.

Essentially, the relief sought by respondent in the trial court was a review on the merits of the administrative proceedings resulting in the final deportation order against him. Ancillary to such relief, respondent also asked for a temporary in-

junction, staying the execution of the deportation order pending a decision on the merits (R. 1–3). Assuming, *arguendo*, that a deportation order may be reviewed apart from habeas corpus proceedings, we submit that the Commissioner of Immigration is an indispensable party to such action, and that therefore the court below erred in holding that the suit could be maintained against the District Director of Immigration alone. In this position we are directly supported by decisions of the Courts of Appeals in the Third and Ninth Circuits. *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C. A. 3); *Rodriguez* v. *Landon*, 212 F. 2d 508 (C. A. 9).

The administrative deportation hearings in the instant case resulted in the hearing officer's recommendation of deportation.[14] However, this decision was not final since the alien filed exceptions with the district director so that the hearing officer's findings and the record were forwarded to the Assistant Commissioner, Adjudication Division, in Washington.[15] On May 5, 1952, the latter adopted

[14] 8 C. F. R. (1951 Cum. Supp.) § 151.5 (a) provided that: "the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to the deportability * * *. The decision shall be concluded with a statement of the hearing officer's disposition of the case which shall be (1) that the alien be deported [etc.]."

[15] The applicable regulation of the Immigration and Naturalization Service provided (8 C. F. R. (1951 Cum. Supp.) 151.5 (c) and (e)):

the hearing officer's decision (R. 2). The order of deportation became final on June 24, 1953, after the Board of Immigration Appeals dismissed respondent's appeal, in accordance with the provisions of 8 C. F. R. (1949 ed.) § 90.3 (*e*).[18]

"(e) *Exceptions to written decision.* The alien or his counsel or representative shall be allowed five business days (which period may be extended by the hearing officer upon a showing of good cause that more time is necessary) in which to submit to the officer in charge of the district or suboffice, for consideration by the Commissioner, exceptions to the hearing officer's decision, which may be accompanied by supporting argument or brief. * * *

* * * * *

"(e) *Finality of decision.* The hearing officer's decision described in paragraphs (a) and (d) of this section shall be final except:

* * * * *

"(4) When the alien or his counsel or representative files exceptions to the hearing officer's decision in conformity with paragraph (e) or (d) of this section.

"Every case within subparagraphs (1) to (4), inclusive, shall be referred promptly to the Commissioner and the hearing officer's decision shall be final only upon approval by the Commissioner, subject, however, to appeal to the Board of Immigration Appeals as provided in § 90.3 of this chapter. In considering such cases, the Commissioner may enter any order which he deems appropriate for the disposition of the case. * * *."

[18] In December 1952, the regulations were revised to conform to the requirements of the Immigration and Nationality Act of 1952. The new regulations contain substantially the same provisions with respect to deportation hearings conducted by a "special inquiry officer," whose order for the deportation of an alien shall be final upon affirmance on direct appeal to the Board of Immigration Appeals in the Office of the Attorney General. 8 C. F. R. (1952 ed.) §§ 242.61, 6.1. The requirement for an intermediate review by the Commissioner has been eliminated.

Thus, upon respondent's filing of exceptions, the proceedings were taken out of the district director's jurisdiction and transferred to the jurisdiction of the central office in Washington. The issuance of a warrant for deportation depended on the Commissioner's adoption of the hearing officer's decision and, since respondent appealed, its affirmance by the Board of Immigration Appeals. Upon such affirmance, the deportation order became enforceable against the person of respondent in whatever district he could be found. It then became incumbent upon the appropriate district director to issue a warrant of deportation and carry out the mandate of the order.[17]

Respondent is not challenging the authority of the district director to issue a warrant of arrest pursuant to the deportation order; the relief respondent has requested against the district director is only ancillary to the principal relief requested. The principal relief sought by him in the trial court is a judicial determination on the merits that the final order for his deportation is unlawful in that it is not supported by legal evidence. Inherently, the action involves a challenge of the manner in which the Commissioner has exercised his authority. And, since only ancillary relief is sought against the district director in whose jurisdiction respondent finds himself, the action in-

[17] 8 C. F. R. (1952 ed.) § 243.1 (a) provides:

"In any case in which an order of deportation becomes final a warrant of deportation shall be issued. District directors shall issue warrants of deportation."

volved herein necessarily raises a controversy as to the validity of the deportation order, not only as a specific authority for the anticipated action of the particular district director, but also as a general authority for the possible action by any other district director.

The instant case, therefore, is not one where the indispensability of the superior officer as a party is to be determined by the application of the test as to whether the decree will culminate in the desired relief "by expending itself on the subordinate official who is before the court." *Williams* v. *Fanning,* 332 U. S. 490, 494. It is rather to be treated as one where the predominant interest of the superior officer in the subject matter of the action, inasmuch as his public duties will be affected by a decision therein, determines his indispensability as a party in accordance with traditional principles of practice. Cf. *Commonwealth Trust Co.* v. *Smith,* 266 U. S. 152; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199; *Brown* v. *Christman,* 126 F. 2d 625 (C. A. D. C.); Rule 19 (a), F. R. Civ. Proc.; see also *Paolo* v. *Garfunkel,* 200 F. 2d 280 (C. A. 3), cited with apparent approval in *Heikkila* v. *Barber,* 345 U. S. 229; *Slavik* v. *Miller,* 184 F. 2d 575 (C. A. 3), certiorari denied, 340 U. S. 955; *Connor* v. *Miller,* 178 F. 2d 755 (C. A. 2).

Respondent's action, therefore, should, on equitable principles, lie against the ultimate promulgator of the order, the Commissioner of Immigration and Naturalization or his Assistant, who would

then be afforded an opportunity to defend his action. See *Plested* v. *Abbey*, 228 U. S. 42, 50–51, and *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578, cited in *Guerich* v. *Rutter*, 265 U. S. 388, 392.

In any event, even if a decree granting the relief requested in the instant case could be considered as sufficient to prevent the district director of New York from issuing a deportation warrant against respondent, the Commissioner would still be considered an indispensable party under the rationale of such cases as *Blackmar* v. *Guerre*, 342 U. S. 512; *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 96; *Williams* v. *Fanning*, 332 U. S. 490; *Colorado* v. *Toll*, 268 U. S. 228; and *Guerich* v. *Rutter*, 265 U. S. 388. The deportation order is not addressed to any particular district director. Thus, the deportation may be carried out not only in the Southern District of New York, where respondent brought the action, but in any part of the United States in which he may be found.

In strict logic, any decree issued by the trial court herein would be binding only upon the district director named as the defendant and within the jurisdiction of that court, and it would in no way preclude directors in other districts from deporting respondent, if he should be found in any of their districts. Thus, unlike the situations in the *Hynes* and *Williams* cases, *supra*, where the decrees gave the full relief requested, a decree by the trial court in the instant case could not "effectively grant the relief desired", for it would not expend "itself on

the subordinate official who is before the court" (332 U. S. at 494). See *Paolo* v. *Garfinkle,* 200 F. 2d 280 (C. A. 3); *Corona* v. *Landon,* 111 F. Supp. 191 (S. D. Calif.). Such relief can be accomplished only by the rescission or abandonment of the deportation order by the Commissioner who is not before the court. We do not read the decisions of this Court as holding that this can be compelled by a suit against a subordinate officer.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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FEBRUARY 1955.

APPENDIX A

STATUTES INVOLVED

Section 242, Immigration and Nationality Act of 1952 (66 Stat. 208, 8 U. S. C. 1252) provides in pertinent part:

APPREHENSION AND DEPORTATION OF ALIENS

(a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not

proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present

evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States

under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may

be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statutes, as amended (41 U. S. C. 5), or section 322 of the Act of June 30, 1932, as amended (40 U. S. C. 278a), to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, opera-

tion, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

Section 360, Immigration and Nationality Act of 1952 (66 Stat. 273, 8 U. S. C. 1503) provides in pertinent part:

PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY IN THE EVENT OF DENIAL OF RIGHTS AND PRIVILEGES AS NATIONAL

* * * * *

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate

the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

Section 10, Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009) provides in pertinent part:

JUDICIAL REVIEW

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(A) RIGHT OF REVIEW

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(B) FORM AND VENUE OF ACTION

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(C) REVIEWABLE ACTS

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(E) SCOPE OF REVIEW

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and deter-

mine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

PERTINENT PORTIONS OF IDENTICAL LETTERS FROM THE ATTORNEY GENERAL DATED MARCH 10, 1954, TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE VICE PRESIDENT

* * * * *

"Historically, the immigration laws of the United States have never provided for judicial review of orders for the deportation of aliens from the United States. However, the courts have permitted such orders to be challenged in habeas corpus proceedings which are available to aliens after they have been taken into custody pursuant to such orders of deportation. In recent years, it has been suggested by judges and lawyers and by officials of this Department that an alien should be able to obtain judicial review of an order for his deportation as soon as it has been issued and without waiting until he has been taken into custody. I concur in this view and believe that the attached legislative proposal will effectively accomplish this desirable change in the law.

"Moreover, there is a present need for clarification on this subject. In 1953, the Court of Appeals for the District of Columbia, in *Rubinstein* v. *Brownell,* 206 F. 2d 449, held that deportation orders issued under the Immigration and Nationality Act of 1952 are reviewable in actions for declaratory judgments as well as in habeas corpus. This decision was affirmed by an equally divided Supreme Court on January 11, 1954, thus leaving the

question in doubt. The Declaratory Judgment Act contains no provisions for expediting the determination of cases involving deportation orders, or for reasonably distributing such cases among the Federal courts. Thus, only specific legislation can provide in this area a judicial remedy other than habeas corpus and at the same time deal adequately with such important aspects of review as orderly venue, expedition, and the prevention of repetitious judicial proceedings."

Attorney General's proposed amendments to the Immigration and Nationality Act of 1952:

TO AMEND THE ACT OF JUNE 27, 1952, TO PROVIDE FOR JUDICIAL REVIEW OF DEPORTATION ORDERS UNDER THE IMMIGRATION LAWS, AND FOR OTHER PURPOSES

That section 242 of the Act of June 27, 1952, (66 Stat. 208; 8 U. S. C. 1252) is hereby amended by adding to that section the following new subsection:

"(i) (1) Any alien against whom a final order of deportation has been made under this section or under law in effect prior to December 24, 1952, and who is not in custody under the immigration laws, may obtain judicial review of such order only by filing a petition for review in the United States District Court for the judicial district within which the administrative proceedings under subsection (b), or the corresponding proceedings under prior law, were conducted, or, if he is in custody pursuant to the immigration laws, in habeas corpus proceedings, but not otherwise. For the purposes of this subsection, a deportation order shall be regarded as final only after the alien has exhausted the administrative remedies

available to him as of right under this Act and the regulations made thereunder. Nothing in this subsection shall preclude the Attorney General from detaining or continuing to detain such alien or taking him into custody pursuant to subsection (c) of this section after the issuance of a final order for his deportation.

(2) "A petition for review under this subsection shall be entitled '_____, *Petitioner* v. *The Immigration and Naturalization Service*, *Respondent*.' Upon the filing of such a petition, two copies shall be served upon the United States Attorney for such judicial district and one copy upon the District Director of the Immigration and Naturalization Service for the immigration district in which the court is located. Upon the filing and service of a petition for review under this subsection, the deportation of the alien shall be deemed stayed pending determination of such petition by the District Court. No such petition shall be filed unless the alien is physically present within the United States at the time of such filing. The respondent shall file any appropriate motion or an answer to the petition within twenty days after service of the petition as prescribed by this subsection, unless for cause shown additional time is allowed. Where necessary, the respondent shall produce in court the administrative record upon which the deportation order was made. The hearing and disposition of such a petition shall be expedited in the same manner as habeas corpus proceedings.

(3) "No objection to a deportation order shall be considered by the court in proceedings under this subsection or in habeas corpus proceedings unless such objection shall

have been urged in the administrative proceedings or, if it was not so urged, unless the court finds there were reasonable grounds for failure to do so, in which event the case shall be remanded for administrative consideration of such objection.

(4) "Except as provided in the following paragraph, the Attorney General's findings of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

(5) "If a person subject to a final order of deportation claims to be a national of the United States and makes a showing that his claim is not frivolous, the issue of his nationality shall be determined *de novo* by the court in proceedings under this subsection or in habeas corpus, in accordance with paragraph (1) of this subsection, and shall not be determined in proceedings under Section 360 (a) of this Act or otherwise.

(6) "A petition under this subsection shall not be entertained by any court if it appears that another such petition previously has been heard and determined by a court of the United States or if the validity of the deportation order has been upheld in habeas corpus or other judicial proceedings, except to the extent that such petition is based upon grounds which the court finds could not have been presented in the prior judicial proceedings. An application for a writ of habeas corpus to review the validity of a deportation order shall not be entertained if it appears that the alien has been denied relief under this subsection, unless it also appears that the procedure prescribed by this subsection is inadequate or ineffective to test the validity of the deportation order or that the application is based upon

grounds which the court finds could not have been presented in the prior proceeding under this subsection."

2. Section 236 of the Act of June 27, 1952 (66 Stat. 200; 8 U. S. C. 1226) is hereby amended by adding to that section the following new subsection:

"(e) Any alien against whom a final order of exclusion has been made may obtain judicial review of such order only in habeas corpus proceedings and not otherwise."